

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

FILMED

JAN 4 1991

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 72662-S76G BY JOHN E. FEE)
AND DON CARLSON)

FINAL ORDER

MAY 10 1991

FILMED

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The Hearing Examiner's Proposal for Decision in this matter was entered on June 13, 1990. The Proposal recommended that the above-referenced Application be denied without prejudice. On July 11, 1990, Objector R V Ranch filed exceptions to the Proposal.

Rule 36.12.229(1), Administrative Rules of Montana, provides that exceptions may be filed by any party adversely affected by a hearing examiner's proposal for decision. Here the decision proposed by the Hearing Examiner is adverse to Applicant, and does not adversely affect Objector. Therefore, Objector's Exceptions are not properly before the Department.

However, one of the issues raised by the Exceptions merits consideration. Objector contends that the denial should be with prejudice because Applicants had their chance to prove the criteria for issuance of a permit. The Department agrees to an extent, but is unable to prevent reapplication. If a person has an application for a permit denied by the Department, nothing in the Water Use Act precludes him from submitting a new application for the same appropriation so long as it is in good faith and is complete and correct. See Mont. Code Ann. §§ 85-2-302 and 310(3) (1989). The opportunity to submit a new application allows a

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person interested in developing a water source to learn from the analysis of a prior proposed appropriation and, by refining the design of the system or acquiring additional data, to succeed in proposing an appropriation in a subsequent application that meets the criteria. For example, after denial of an application, a determined applicant may conduct studies on water availability that develop data so conclusive that holders of prior water rights who objected to the previous application express no interest in objecting to a subsequent application because they are convinced they would not be adversely affected by the proposed appropriation. To bar this potential water user from applying for a permit to beneficially use the water because of a previous denial would be contrary to § 85-2-101, MCA, which states that it is the policy of the State of Montana to encourage the wise use of the state's water resources.

However, the Department has held that collateral estoppel may serve to provide a force of finality to its former proceedings and may be applied to protect an objector from dogged relitigation of a single case. See In re Application No. 34204-s42M by Chaffee; In re Application Nos. G05081 and G05083 by Moldenhauer; In re Application No. 54694-g410 by Crumpled Horn. This protection should be applied if none of the circumstances differ between a formerly denied application and a newly submitted one. If, however, elements of the application or other circumstances framing the issues in the matter are different, collateral estoppel cannot apply. It behooves agents of the

Department who receive new applications resembling formerly denied applications to review them carefully to determine whether they are good faith attempts to approach the proposed appropriation differently. In this case Objectors may raise collateral estoppel arguments if Applicants reapply.

There are no further exceptions for the Department's consideration.

WHEREFORE, based upon the record herein, the Department adopts without modification the findings and conclusions of the Proposal for Decision and issues the following:


ORDER

Application for Beneficial Water Use Permit No. 72662-s76G by John A. Fee and Don Carlson is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 14 day of November, 1990.


Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 15th day of November, 1990, as follows:

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James O'Connell
R.V. Ranch Company
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Honorable C. Bruce Loble
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Cindy M Campbell
Cindy G. Campbell
Hearings Unit Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 72662-s76G BY JOHN A. FEE)	
AND DON CARLSON)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 9, 1990 in Helena, Montana.

Applicant John A. Fee appeared pro se and by and through counsel Alan L. Joscelyn.

Applicant Don Carlson appeared by and through counsel Alan L. Joscelyn.

Objector R. V. Ranch Company appeared by and through counsel C. Bruce Loble.

Douglas C. Parker, Hydrogeologist with Hydrometrics, Inc., appeared as a witness for the Applicant.

James O'Connell, President of Capri, Inc. which owns the R. V. Ranch Company, appeared as a witness for the Objector.

Rick Bondy, Chief of the Engineering Bureau of the Department of Natural Resources and Conservation, appeared as a witness for the Objector.

Gregory Van Voast, Water Rights Specialist in the Helena Water Resources Field Office of the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing.

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EXHIBITS

Applicants offered two exhibits for inclusion in the record.

Applicants' Exhibit 1 is a 1977, with 1984 and 1986 updates, map of the Helena National Forest. Applicant Fee circled, in blue ink, Section 14, Township 9 North, Range 6 West, during the hearing. This exhibit was accepted into the record without objection.

Applicants' Exhibit 2 is a hand-drawn map of mining claim and creek, showing the locations of the settling ponds, and the sump. Applicant Fee sketched, in blue ink, the location of the wash plant during the hearing. Objector objected because it is not the best evidence of the claim. Objection overruled.

Objector offered four exhibits for inclusion in the record.

Objector's Exhibit 1 consists of 71 pages. This exhibit is actually offered by both parties. The Objector offered five pages of Abstracts of Water Right in the Temporary Preliminary Decree for Basin 76G issued by the Water Court. The remaining pages are copies of Statements of Claim filed by R. V. Ranch Company. The Applicants intended to show that of the 12 Statements of Claim listed in the Objection to Application submitted by the Applicant, only four Statements of Claim are for water from the Applicants' proposed source. Objector agreed. The identification label was affixed to Abstract of Water Right No. 116549 before the agreement, therefore that copy is attached to the exhibit but the Abstract is not part of the record.

Objector's Exhibit 2 consists of a three pages which are warranty deeds transferring certain properties from Edmund and Eve O'Connell to the R. V. Ranch Company. This exhibit was accepted into the record without objection.

Objector's Exhibit 3 is a copy of a "File Copy" of a USGS Quadrangle Map, Elliston, Montana, 1959. This exhibit has been enhanced to show some of the R. V. Ranch Company holdings in the area. This exhibit was entered into the record without objection.

Objector's Exhibit 4 consists of 13 pages and is a copy of the Montana Pollutant Discharge Elimination System Application To Discharge From A Placer Mining Operation - Short Form P, submitted by the Applicant to the Water Quality Bureau of the Department of Health and Environmental Sciences and the Permit granted to the Applicants by the Department of Health and Environmental Sciences. Applicant objected to the entry of this exhibit into the record on the grounds that it is not pertinent to the case. Objection overruled.

The Department file was reviewed by all parties who had no objections to its content. Therefore the Department file was accepted into the record in its entirety.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by

applying for and receiving a permit from the department." The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in the present matter.

2. John A. Fee and Don Carlson filed the above-entitled Application with the Department on October 26, 1989 at 10:30 a.m.

3. Pertinent portions of the Application were published in the Silver State Post, a newspaper of general circulation in the area of the source, on December 14, 1989.

4. The Applicants who own the Johnny Be Good mining claim, located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ of Section 13, Township 9 North, Range 6 West, propose to appropriate 175 gallons per minute (gpm) up to 27.50 acre-feet of the waters of an unnamed tributary of Mike Renig Creek nonconsumptively for placer mining purposes. The proposed means of diversion is a headgate with pipeline when there would be sufficient surface water to use this method. When there is insufficient surface water, a sump, which collects subsurface water, and a pump with pipeline would be used. The proposed points of diversion and places of use are the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13 and the S $\frac{1}{2}$ NE $\frac{1}{4}$ and the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 14, all in Township 9 North, Range 6 West, Powell County. The proposed period of appropriation and use is from June 1 through September 15, inclusive of each year. (Department file, Objector's Exhibit 4 and testimony of Applicant Fee.)

5. There is no surface water in the old creek bed. When the Applicants dug the settling ponds and the test hole, water was encountered at approximately four feet below the surface. This

water is most likely in direct hydrologic connection the creek.
(Applicant Fee's testimony)

6. In the spring, the water flows in a stream approximately three feet wide and six inches deep. As the year progresses, the flow decreases until, by August, there is very little water in the source. (Testimony of Applicant Fee)

7. Applicant Fee testified that he thought the spring flow of the creek is approximately 20 miner's inches. However, on cross-examination, it was determined that Mr. Fee was not sure just what a miner's inch of water is. All testimony given by Applicant Fee concerning amounts of water in miner's inches will be stricken from the record.

8. The proposed operation is to divert the water through a two-inch pipe which would carry it to the wash plant which separates the gravels from the gold. The used water would run into two settling ponds, then into the old creek bed for a distance of 100 to 150 feet where it joins the main creek bed.
(Testimony of Applicant Fee and Applicants' Exhibit 2)

9. The settling ponds are located in the old creek bed as is the wash plant, sump, and test hole. There is a six-inch pipe rerouting the creek around the working area. As it runs through the pipe, some of the water can be diverted into a two-inch pipe for use in the wash plant. (Testimony of Applicant Fee and Applicants' Exhibit 2)

10. Applicant Fee testified that he thought there would be sufficient water to run his wash plant. However he later stated

that he did not really know how much water would be needed to run the wash plant. He stated that with the water in the sump and the water in the creek, there should be enough water to run the wash plant.

11. Objector has filed four Statements of Claim before the Water Courts claiming irrigation rights on Mike Renig Creek.
(Objector's Exhibit 1)

12. Objector has two leases to graze cattle in the Helena National Forest. The "Minnihaha" lease is in the same area as the Applicants' mining claims. (Testimony of James O'Connell)

13. Applicants' witness Parker testified that, based on his expertise, the evidence presented at the hearing and his conversations with Applicant Fee, the water should return to the source with no delay. Objector's witness Bondy testified that, based on the evidence presented at the hearing and his expertise, there would be a delay when the discharge water from the settling ponds flowed into the old creek bed, that there may even be a loss of water as it flows into the old creek bed.

14. Department records reveal no other planned uses or developments for which a permit has been issued or water has been reserved.

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein and the parties hereto.

3. The Department must issue a Beneficial Water use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The proposed use of water, mining, is a beneficial use of water. See § 85-2-102(2)(a), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 8, and 9.

6. The Applicants have possessory interest in the proposed place of use. See Finding of Fact 4.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 14.

8. In order to meet the criteria set forth in § 85-2-311(1)(a), MCA, Applicants must prove by substantial credible evidence that, at least in some years, sufficient unappropriated water will be physically available at the point of diversion to supply their needs throughout the period of diversion.

Applicant Fee does not know how much water is flowing in the stream, nor does he know how much water is needed to run the wash plant. See Findings of Fact 7 and 10.

9. In order to meet the criterion set forth in § 85-2-311(b), MCA, the Applicants must prove by substantial credible evidence that the water must be returned to the source without significant delay so the downstream conditions will suffer little or no disruption.

Applicants assert that the use is nonconsumptive, implying there will never be a call for the water. Yet, no substantial credible evidence was introduced for the record that the water would return to the stream without loss of water or without delay. There was contradictory evidence given by the Applicants' witness and Objectors' witness; each as credible as the other. Neither witness had physically observed the site; both based their testimony on what they had heard and their expertise. See Finding of Fact 13.

10. Applicants have failed to meet the criteria set forth in § 85-2-311(1)(a) and (b), MCA.

11. Because the Proposal for Decision in this matter is rendered on basis of a failure of proof, rather than because the parties developed a full record and the evidence weighed against the Applicants, the proposed order is made without prejudice. The Applicants may reapply for a Beneficial Water Use Permit at such time as they may have the necessary evidence.

WHEREFORE, based upon the foregoing proposed Findings of Facts and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

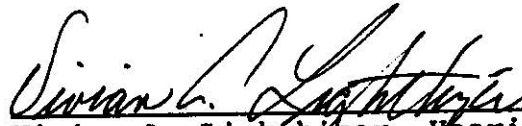
Application for Beneficial Water Use Permit No. 72662-s76G by John A. Fee and Don Carlson is hereby denied without prejudice.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served on all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of June, 1990.


Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, MT 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13th day of June, 1990, as follows:

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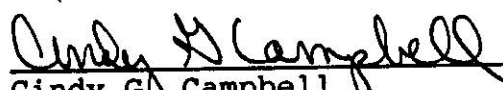
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